Mercer County Athenaeum

SPEECH

9033

OF THE

HON. JOHN MARSHALL,

R

DELIVERED IN THE

HOUSE OF REPRESENTATIVES,

OF THE

UNITED STATES,

ON THE RESOLUTIONS OF THE

HON. EDWARD LIVINGSTON,

RELATIVE TO

THOMAS NASH,

ALIAS

JONATHAN ROBBINS.

PHILADELPHIA:

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SPEECH, &c.

MR. MARSHALL said, believing, as he did most seriously—that in a government constituted like that of the United States, much of the public happiness depended, not only on its being rightly administered, but on the measures of administration being rightly understood:—On rescuing public opinion from those numerous prejudices with which so many causes might combine to surround it:—he could not but have been highly gratified with the very eloquent,—and what was still more valuable, the very able, and very correct argument, which had been delivered by the gentleman from Delaware (Mr. Bayard) against the resolutions now under consideration. He had not expected that the effect of this argument would have been universal, but he had cherished the hope, and in this he had not been disappointed, that it would be very extensive. He did not flatter himself with being able to shed much new light on the subject, but, as the argument in opposition to the resolutions had been assailed, with

conſiderable ability, by gentlemen of great talents, he truſted the houſe would not think the time miſapplied, which would be devoted to the re-eſtabliſhment of the principles contained in that argument, and to the refutation of thoſe advanced in oppoſition to it. In endeavouring to do this, he ſhould notice the obſervations in ſupport of the reſolutions, not in the preciſe order in which they were made, but as they applied to the different points he deemed it neceſſary to maintain, in order to demonſtrate, that the conduct of the executive of the United States, could not juſtly be charged with the errors imputed to it by the reſolutions.

His firſt propoſition, he ſaid, was that the caſe of Thomas Naſh, as ſtated to the Preſident, was completely within the 27th article of the treaty of amity, commerce, and navigation, entered into between the United States of America and Great Britain.

He read the article and then obſerved—The caſus fœderis of this article occurs, when a perſon, having committed murder or forgery within the juriſdiction of one of the contracting parties, and having ſought an aſylum in the country of the other, is charged with the crime, and his delivery demanded, on ſuch proof of his guilt as according to the laws of the place where he ſhall be found, would juſtify his apprehenſion and commitment for trial, if the offence had there been committed.

The caſe ſtated is, that Thomas Naſh, having committed a murder on board a Britiſh Frigate, navigating the high ſeas under a commiſſion from his Britannic Majeſty, had

ſought an aſylum within the United States, and on this caſe his delivery was demanded by the miniſter of the King of Great Britain.

It is manifeſt that the caſe ſtated, if ſupported by proof, is within the letter of the article, provided a murder committed in a Britiſh frigate, on the high ſeas, be committed within the juriſdiction of that nation.

That ſuch a murder is within their juriſdiction, has been fully ſhown by the gentleman from Delaware. The principle is, that the juriſdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. The laws of a nation are rightfully obligatory on its own citizens in every ſituation, where thoſe laws are really extended to them. This principle is founded on the nature of civil union. It is ſupported every where by public opinion, and is recognized by writers on the law of nations. Rutherforth in his ſecond volume page 180 ſays, "The juriſdiction which a civil ſociety has over the perſons of its members, affects them immediately, whether they are within its territories or not."

This general principle is eſpecially true, and is particularly recognized, with reſpect to the fleets of a nation on the high ſeas. To puniſh offences committed in its fleet, is the practice of every nation in the univerſe; and conſequently the opinion of the world is, that a fleet at ſea, is within the juriſdiction of the nation to which it belongs. Rutherforth 2 vol. page 491, ſays. "There can be no doubt about the juriſdiction of a nation over the perſons, which compoſe its fleets, when they are out at

ſea, whether they are ſailing upon it, or are ſtationed in any particular part of it."

The gentleman from Pennſylvania, (Mr. Gallatin) tho' he has not directly controverted this doctrine, has ſought to weaken it, by obſerving, that the juriſdiction of a nation at ſea could not be compleat even in its own veſſels; —and in ſuppport of this poſition he urged the admitted practice, of ſubmitting to ſearch for contraband—a practice not tolerated on land, within the territory of a neutral power. The rule is as ſtated; but is founded on a principle which does not affect the juriſdiction of a nation over its citizens or ſubjects in its ſhips. The principle is, that in the ſea, itſelf, no nation has any juriſdiction. All may equally exerciſe their rights, and conſequently the right of a belligerent power to prevent aid being given to his enemy, is not reſtrained by any ſuperior right of a neutral in the place. But if this argument poſſeſſed any force, it would not apply to national ſhips of war, ſince the uſage of nations does not permit them to be ſearched.

According to the practice of the world then, and the opinions of writers on the law of nations, the murder committed on board a Britiſh frigate navigating the high ſeas, was a murder committed within the juriſdiction of the Britiſh nation.

Altho ſuch a murder is plainly within the letter of the article, it has been contended not to be within its juſt conſtruction, becauſe at ſea, all nations have a common juriſdiction, and the

article correctly construed, will not embrace a case of concurrent jurisdiction.

It is deemed unnecessary to controvert this construction, because the proposition—*that the United States had no jurisdiction over the murder committed by Thomas Nash*, is believed to be completely demonstrable.

It is not true that all nations have jurisdiction over all offences committed at sea. On the contrary no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself. This principle is laid down in 2d. Ruth. 488, and 491.

The American government has on a very solemn occasion, avowed the same principle. The first minister of the French republic asserted and exercised powers of so extraordinary a nature, as unavoidably to produce a controversy with the United States. The situation in which the government then found itself was such, as necessarily to occasion a very serious and mature consideration of the opinions it should adopt. Of consequence, the opinions then declared, deserve great respect. In the case alluded to, Mr. Genet had asserted the right of fitting out privateers in the American ports, and of manning them with American citizens, in order to cruize against nations with whom America was at peace. In reasoning against this extravagant claim, the then secretary of state, in his letter of the 17th of June, 1793, says "For our citizens then to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the executive and to those whom they consulted, as much

againſt the laws of the land, as to murder or rob, or combine to murder or rob, its own citizens; and as much to require puniſhment, if done, within their limits, where they have a territorial juriſdiction, or on the high ſeas, where they have a *perſonal juriſdiction*, that is to ſay, one which reaches *their own citizens only*; this being an *appropriate part* of each nation, on an element where all have a common juriſdiction."

The well conſidered opinion then of the American government on this ſubject is, that the juriſdiction of a nation at ſea is *perſonal*," reaching its "*own citizens only*," and that this is "*the appropriate part* of each nation" on that element.

This is preciſely the opinion maintained by the oppoſers of the reſolutions. If the juriſdiction of America at ſea be perſonal—reaching its own citizens only, if this be its appropriate part, then the juriſdiction of the nation cannot extend to a murder committed by a Britiſh ſailor, on board a Britiſh frigate navigating the high ſeas under a commiſſion from his Britannic majeſty.

As a further illuſtration of the principle contended for, ſuppoſe a contract made at ſea, and and a ſuit inſtituted for the recovery of money which might be due thereon. By the laws of what nation would the contract be governed? The principle is general, that a perſonal contract follows the perſon, but is governed by the law of the place where it is formed. By what law then would ſuch a contract be governed! If all nations had juriſdiction over the place, then the laws of all nations would equally influence the contract but certainly no man will heſitate

to admit, that such a contract ought to be decided according to the laws of that nation, to which the vessel or contracting parties might belong.

Suppose a duel attended with death, in the fleet of a foreign nation, or in any vessel which returned safe to port, could it be pretended that any government on earth, other than that to which the fleet or vessel belonged, had jurisdiction in the case; or that the offender could be tried by the laws, or tribunals, of any other nation whatever.

Suppose a private theft by one mariner from another and the vessel to perform its voyage and return in safety, would it be contended that all nations have equal cognizance of the crime; and are equally authorized to punish it?

If there be this common jurisdiction at sea, why not punish desertion from one belligerent power to another, or correspondence with the enemy, or any other crime which may be perpetrated? A common jurisdiction over all offences at sea, in whatever vessel committed, would involve the power of punishing the offences which have been stated. Yet all gentlemen will disclaim this power. It follows then that no such common jurisdiction exists.

In truth the right of every nation to punish, is limited, in its nature, to offences against the nation inflicting the punishment. This principle is believed to be universally true.

It comprehends every possible violation of its laws on its own territory, and it extends to violations committed elsewhere by persons it has a right to bind. It extends also to general piracy.

A pirate under the law of nations, is an enemy of the human race. Being the enemy of all he is liable to be puniſhed by all. Any act which denotes this univerſal hoſtility, is an act of piracy. Not only an actual robbery therefore, but cruizing on the high ſeas without commiſſion, and with intent to rob, is piracy. This is an offence againſt all and every nation and is therefore alike puniſhable by all. But an offence which in its nature affects only a particular nation, is only puniſhable by that nation.

It is by confounding general piracy with piracy by ſtatute, that indiſtinct ideas have been produced, reſpecting the power to puniſh offences committed on the high ſeas.

A ſtatute may make any offence piracy, committed within the juriſdiction of the nation paſſing the ſtatute, and ſuch offence will be puniſhable by that nation. But piracy under the law of nations, which alone is puniſhable by all nations, can only conſiſt in an act which is an offence againſt all. No particular nation can increaſe or diminiſh the liſt of offences thus puniſhable.

It had been obſerved by his colleague (Mr. Nicholas) for the purpoſe of ſhowing that the diſtinction taken on this ſubject by the gentleman from Delaware, (Mr. Bayard) was inaccurate, that any veſſel robbed on the high ſeas, could be the property only of a ſingle nation, and being only an offence againſt that nation, could be, on the principle taken by the oppoſers of the reſolutions no offence againſt the law of nations: But in this his colleague had not accurately conſidered the principle. As a man, who turns out to rob

on the high way, and forces from a ſtranger his purſe with a piſtol at his boſom, is not the particular enemy of that ſtranger, but alike the enemy of every man who carries a purſe, ſo thoſe, who, without a commiſſion, rob on the high ſeas, manifeſt a temper hoſtile to all nations, and therefore become the enemies of all. The ſame inducements which occaſion the robbery of one veſſel, exiſt to occaſion the robbery of others, and therefore the ſingle offence is an offence againſt the whole community of nations, manifeſts a temper hoſtile to all, is the commencement of an attack on all, and is conſequently, of right, puniſhable by all.

His colleague had alſo contended that all the offences at ſea, puniſhable by the Britiſh Statutes from which the act of Congreſs was in a great degree copied, were piracies at common law, or by the law of nations, and as murder is among theſe, conſequently murder was an act of piracy by the law of nations, and therefore puniſhable by every nation. In ſupport of this poſition he had cited 1. Hawk. P. C. 267 and 271. 3d Inſt. 112 and 1ſt Woodiſon 140.

The amount of theſe caſes is, that no new offence is made piracy by the ſtatutes; but that a different tribunal is created for their trial, which is guided by a different rule, from that which governed, previous to thoſe Statutes. Therefore, on an indictment for piracy, it is ſtill neceſſary to prove an offence which was piracy before the Statutes. He drew from theſe authorities a very different concluſion from that which had been drawn by his colleague. To ſhow the correctneſs of his con-

concluſion, it was neceſſary to obſerve, that Statute did not indeed change the nature of piracy ſince it only transferred the trial of the crime to a different tribunal, where different rules of deciſion prevailed, but having done this, other crimes committed on the high ſeas, which were not piracy, were made puniſhable by the ſame tribunal, but certainly this municipal regulation could not be conſidered as proving, that thoſe offences were before, piracy by the law of nations. Mr. Nicholas inſiſted that the law was not correctly ſtated, whereupon Mr. Marſhall called for 3d inſt. and read the ſtatute.

" All treaſons, felonies, robberies, murders, and confederacies committed in or upon the ſeas, &c. ſhall be enquired, tried, heard, determined and judged in ſuch ſhires, &c. in like form and condition as if any ſuch offence had been committed on the land, &c."

" And ſuch as ſhall be convicted &c. ſhall have and ſuffer ſuch pains of death, &c. as if they had been attainted of any treaſon, felony, robbery, or other the ſaid offences done upon the land."

This ſtatute it is certain, does not change the nature of piracy, but all treaſons, felonies, robberies, murders and confederacies committed in or upon the ſea, are not declared to have been, nor are they, piracies. If a man be indicted as a pirate, the offence muſt be ſhown to have been piracy before the ſtatute, but if he be indicted for treaſon, felony, robbery, murder, or confederacy committed at ſea, whether ſuch offence was or was not a piracy, he ſhall be puniſhed in like manner as if he had committed

the ſame offence at land. The paſſage cited from 1. Woodiſon 140, is a full authority to this point. Having ſtated that offences committed at ſea were formerly triable before the Lord high Admiral, according to the courſe of the Roman civil law, Woodiſon ſays but by the Statutes 27 H. 8th. C 4. and 28. H. 8. C. 15. all treaſons, felonies, piracies and other crimes committed on the ſea or where the Admiral has juriſdiction, ſhall be tried in the realm as if done on land." But the Statutes referred to affect only the manner of the trial *ſo far as reſpects piracy*. The nature of the offence is not changed. Whether a charge amounts to piracy or not, muſt ſtill depend on the law of nations, except where, *in the caſe of Britiſh ſubjects*, expreſs acts of Parliament have declared that the crimes therein ſpecified ſhall be adjudged piracy, or ſhall be liable to the ſame mode of trial and degree of puniſhment."

This paſſage proves not only that all offences at ſea are not piracies by the law of nations, but alſo that all indictments for piracy muſt depend on the law of nations, "except where, *in the caſe of Britiſh ſubjects, expreſs acts of Parliament*" have changed the law. Why do not theſe "expreſs acts of Parliament" change the law as to others than "Britiſh ſubjects"? The words are general—"All treaſons, felonies &c." Why are they confined in conſtruction to Britiſh ſubjects? The anſwer is a plain one. The juriſdiction of the nation is confined to its territory and to its ſubjects.

The gentleman from Pennſylvania [Mr. Gallatin] abandons, and very properly abandons, this untenable ground. He admits that no nation has a right to puniſh offences againſt another nation, and that the United States can only puniſh offences againſt their own laws, and the laws of nations. He admits too, that if there had only been a mutiny [and conſequently if there had only been a murder] on board the Hermoine, that the American courts could have taken no cognizance of the crime. Yet mutiny is puniſhable as piracy by the law of both nations. That gentleman contends that the act commited by Naſh was piracy according to the law of nations. He ſupports his poſition by inſiſting, that the offence may be conſtituted by the commiſſion of a ſingle act, that unauthorized robbery on the high ſeas is this act, and that the crew having ſeized the veſſel and being out of the protection of any nation, were pirates.

It is true that the offence may be complete by a ſingle act—but it depends on the nature of that act. If it be ſuch as manifeſts general hoſtility againſt the world, an intention to rob generally, then it is piracy; but if it be merely a mutiny and murder in a veſſel, for the purpoſe of delivering it up to the enemy, it ſeems to be an offence againſt a ſingle nation, and not to be piracy. The ſole object of the crew might be to go over to the enemy, or to free themſelves from the tyranny experienced on board a ſhip of war, and not to rob generally.

But ſhould it even be true, that running away with the veſſel to deliver her up to an enemy, was an act of general piracy, puniſhable by all nations, yet the mutiny and murder was a diſtinct offence.—Had the attempt to ſeize the veſſel failed, after the commiſſion of the murder, then, according to the argument of the gentleman from Pennſylvania, the American courts could have taken no cognizance of the crime. Whatever then might have been the law reſpecting the piracy, of the murder there was no juriſdiction. For the murder, not the piracy, Naſh was delivered up. Murder, and not piracy, is comprehended in the 27th article of the treaty between the two nations. Had he been tried then, and acquitted on an indictment for the piracy, he muſt ſtill have been delivered up for the murder, of which the court could have no juriſdiction. It is certain that an acquittal of the piracy, would not have diſcharged the murder; and therefore in the ſo-much relied on trials at Trenton, a ſeparate indictment for murder was filed, after an indictment for piracy. Since then, if acquitted for piracy, he muſt have been delivered to the Britiſh government on the charge of murder, the Preſident of the United States might, very properly, without proſecuting for the piracy, direct him to be delivered up on the murder.

All the gentlemen who have ſpoken in ſupport of the reſolutions, have contended that the caſe of Thomas Naſh is within the purview of the act of Congreſs, which relates to this ſubject, and is, by that act, made puniſhable in the American courts. That is, that the act of Congreſs deſigned to puniſh crimes committed on board a Britiſh frigate.

Nothing can be more completely demonſtrable than the untruth of this propoſition.

It has already been ſhewn, that the legiſlative juriſdiction of a nation, extends only to its own territory, and to its own citizens, wherever they may be. Any general expreſſion in a legiſlative act, muſt, neceſſarily, be reſtrained to objects within the juriſdiction of the legiſlature paſſing the act. Of conſequence, an act of Congreſs can only be conſtrued to apply to the territory of the United States, comprehending every perſon within it, and to the citizens of the United States.

But independent of this undeniable truth, the act itſelf affords complete teſtimony of its intention and extent. [See Laws of the U. S. vol. 1. p. 100.]

The title is, "An act for the puniſhment of certain crimes againſt the United States." Not againſt Britain—France—or the World;—but ſingly, "againſt the United States."

The firſt ſection relates to treaſon, and its objects are "any perſon or perſons owing allegiance to the United States." This deſcription comprehends only the citizens of the United States, and ſuch others as may be on its territory, or in its ſervice.

The ſecond ſection relates to miſ-priſon of treaſon, and declares, without limitation, that any perſon or perſons, having knowledge of any treaſon, and not communicating the ſame, ſhall be guilty of that crime. Here then is an inſtance of that limited deſcription of perſons in one ſection, and of that general deſcription in another, which has been relied on to ſupport

the conſtruction contended for by the friends of the reſolutions. But will it be pretended that a perſon can commit miſ-priſon of treaſon, who cannot commit treaſon itſelf? That he would be puniſhable for concealing a treaſon, who could not be puniſhed for plotting it? Or can it can it be ſuppoſed that the act deſigned to puniſh an Engliſhman or a Frenchman, who, reſiding in his own country, ſhould have knowledge of treaſons againſt the United States, and ſhould not croſs the Atlantic to reveal them?

The ſame obſervations apply to the 6th ſection which makes "any perſon or perſons" guilty of miſ-priſon of felony, who having knowledge of murder or other offences enumerated in that ſection, ſhould conceal them. It is impoſſible to apply this to a foreigner, in a foreign land, or to any perſon not owing allegiance to the United States.

The 8th ſection, which is ſuppoſed to comprehend the caſe, after declaring that if any perſon or perſons ſhall commit murder on the high ſeas, he ſhall be puniſhable with death, proceeds to ſay, that if any captain or mariner ſhall piratically run away with a ſhip or veſſel, or yield her up voluntarily to a pirate, or if any ſeaman ſhall lay violent hands on his commander, to prevent his fighting, or ſhall make a revolt in the ſhip, every ſuch offender ſhall be adjudged a pirate, and a felon.

The perſons who are the objects of this ſection of the act, are all deſcribed in general terms, which might embrace the ſubjects of all nations. But it is to be ſuppoſed, that if, in an engagement between an Engliſh and a French

ſhip of war, the crew of the one or the other, ſhould lay violent hands on the captain, and force him to ſtrike, that this would be an offence againſt the act of Congreſs, puniſhable in the courts of the United States? On this extended conſtruction of the general terms of the ſection, not only the crew of one foreign veſſel forcing their captain to ſurrender to another, would incur the penalties of the act, but if in the late action between the gallant Truxton and a French frigate, the crew of that frigate had compelled the captain to ſurrender, while he was unwiilling to do ſo, they would have been indictable as felons in the courts of the United States. But ſurely the act of Congreſs admits of no ſuch extravagant conſtruction.

His colleague, Mr. Marſhal ſaid, had cited, and particularly relied on the 9th ſection of the act. That ſection declares, that if a citizen ſhall commit any of the enumerated piracies, or any act of hoſtility on the high ſeas, againſt the United States, under color of a commiſſion from any foreign Prince or State, he ſhall be adjudged a pirate, felon and robber, and ſhall ſuffer death.

This ſection is only a poſitive extenſion of the act to a caſe, which might otherwiſe have eſcaped puniſhment. It takes away the protection of a foreign commiſſion, from an American citizen who, on the high ſeas robs his countrymen. This is no exception from any preceding part of the law, becauſe there is no part which relates to the conduct of veſſels commiſſioned by a foreign power; it only proves that, in the opinion of the legiſlature,

the penalties of the act could not, without this expreſs proviſion, have been incurred by a citizen holding a foreign commiſſion.

It is then moſt certain, that the act of Congreſs does not comprehend the caſe of a murder committed on board a foreign ſhip of war.

The gentleman from New-York has cited 2d Woodiſon 428, to ſhow that the courts of England extend their juriſdiction to piracies committed by the ſubjects of foreign nations.

This has not been doubted. The caſe from Woodiſon is a caſe of robberies committed on the high ſeas by a veſſel without authority. There are ordinary acts of piracy, which, as has been already ſtated, being offences againſt all nations, are puniſhable by all. The caſe from 2d Woodiſon, and the note cited from the ſame book by the gentleman from Delaware, are ſtrong authorities againſt the doctrines contended for by the friends of the reſolutions.

It has alſo been contended that the queſtion of juriſdiction was decided at Trenton, by receiving indictments againſt perſons there arraigned for the ſame offence, and by retaining them for trial after the return of the habeas corpus.

Every perſon in the ſlighteſt degree acquainted with judicial proceedings, knows, that an indictment is no evidence of juriſdiction; and that in criminal caſes, the queſtion of juriſdiction will ſeldom be made, but by arreſt of judgement after conviction.

The proceedings after the return of the habeas corpus, only prove, that the case was not such a case as to induce the Judge immediately to decide against his jurisdiction. The question was not free from doubt, and therefore might very properly be postponed until its decision should become necessary.

It has been argued by the gentleman from New-York, that the form of the indictment is, itself, evidence of a power in the court to try the cafe. Every word of that indictment said the gentleman, gives the lie, to a denial of the jurisdiction of the court.

It would be assuming a very extraordinary principle indeed to say, that words inserted in an indictment for the express purpose of assuming the jurisdiction of a court, should be admitted to prove that jurisdiction. The question certainly depended on the nature of the fact, and not on the description of the fact. But as an indictment must necessarily contain formal words in order to be supported, and as forms often denote what a case must substantially be, to authorize a court to take cognizance of it, some words in the indictments at Trenton, ought to be noticed. The indictments charge the persons to have been within the peace, and the murder to have been committed against the peace of the United States. These are necessary averments, and, to give the court jurisdiction, the fact ought to have accorded with them. But who will say that the crew of a British frigate on the high seas, are within the peace of the United States, or a murder committed on board such a frigate, against the

peace of any other than the Britiſh government.

It is then demonſtrated that the murder with which Thomas Naſh was charged, was not committed within the juriſdiction of the United States, and, conſequently, that the caſe ſtated was completely within the letter, and the ſpirit, of the 27th article of the treaty between the two nations. If the neceſſary evidence was produced, he ought to have been delivered up to juſtice. It was an act to which the American Nation was bound by a moſt ſolemn compact. To have tried him for the murder would have been mere mockery. To have condemned and executed him, the court having no juriſdiction, would have been murder:—to have acquitted and diſcharged him, would have been a breach of faith and a violation of national duty.

But it has been contended that altho' Thomas Naſh ought to have been delivered up to the Britiſh Miniſter, on the requiſition made by him in the name of his government, yet the interference of the Preſident was improper.

This Mr. Marſhall ſaid led to his ſecond propoſition, which was—

That the caſe was a caſe for executive and not judicial deciſion. He admitted implicitly the diviſion of powers ſtated by the gentleman from New York, and that it was the duty of each department to reſiſt the encroachments of the others.

This being eſtabliſhed, the enquiry was, to what department was the power in queſtion allotted?

The gentleman from New-York had relied on the 2d ſection of the 3d article of the conſtitution, which enumerates the caſes to which the judicial power of the United States extends, —as expreſſly including that now under conſideration. Before he examined that ſection, it would not be improper to notice a very material mis-ſtatement of it, made in the reſolutions offered by the gentleman from New York. By the conſtitution, the judicial power of the United States is extended to all *caſes in law and equity* ariſing under the conſtitution, laws and treaties of the United States; but the reſolutions declare the judicial power to extend to *all queſtions* ariſing under the conſtitution, treaties and laws of the United States. The difference between the conſtitution and the reſolutions was material and apparent. A caſe in law or equity was a term well underſtood, and of limited ſignification. It was a controverſy between parties which had taken a ſhape for judicial deciſion. If the judicial power extended to every *queſtion* under the conſtitution it would involve almoſt every ſubject proper for legiſlative diſcuſſion and deciſion; if to every *queſtion* under the laws and treaties of the United States it would involve almoſt every ſubject on which the executive could act. The diviſion of power which the gentleman had ſtated, could exiſt no longer, and the other departments would be ſwallowed up by the judiciary. But it was apparent that the reſolutions had eſſentially miſrepreſented the conſtitution. He did not charge the gentleman from New-York, with intentional miſrepreſentation; he would not attribute

to him such an artifice in any case, much less in a case where detection was so easy and so certain. Yet this substantial departure from the constitution, in resolutions affecting substantially to unite it, was not the less worthy of remark for being unintentional. It manifested the course of reasoning by which the gentleman had himself been misled, and his judgement betrayed into the opinions those resolutions expressed.

By extending the judicial power to all *cases in law and equity*, the constitution had never been understood, to confer on that department, any political power whatever. To come within this description, a question must assume a legal form, for forensic litigation, and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

A case in law or equity proper for judicial decision, may arise under a treaty, where the rights of individuals acquired or secured by a treaty, are to be asserted or defended in court. As under the 4th or 6th article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Prussia, and other nations, which secure to the subjects of those nations, their property within the United States: or as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws, and in the courts of the United States. But the judicial

power cannot extend to political compacts—as the eſtabliſhment of the boundary line between the American and Britiſh dominions; the caſe of the late guarantee in our treaty with France; or the caſe of the delivery of a murderer under the 27th article of our preſent treaty with Britain.

The gentleman from New-York has aſked, triumphantly aſked, what power exiſts in our courts to deliver up an individual to a foreign government? Permit me, ſaid Mr. Marſhal, but not triumphantly, to retort the queſtion.—By what authority can any court render ſuch a judgement? What power does a court poſſeſs to ſeize any individual, and determine that he ſhall be adjudged by a foreign tribunal? Surely our courts poſſeſs no ſuch power, yet they muſt poſſeſs it, if this article of the treaty is to be executed by the courts.

Gentlemen have cited and relied on that clauſe in the conſtitution, which enables Congreſs to define and puniſh piracies, and felonies; committed on the high ſeas, and offences againſt the law of nations; together with the act of Congreſs declaring the puniſhment of thoſe offences; as transferring the whole ſubject to the courts. But that clauſe can never be conſtrued to make to the government a grant of power, which the people making it, did not themſelves poſſeſs. It has already been ſhown that the people of the United States have no juriſdiction over offences, commited on board a foreign ſhip, againſt a foreign nation Of conſequence, in framing a government for themſelves, they cannot have p ſſed this juriſ-

diction to that government. The law therefore cannot act upon the case. But this clause of the constitution cannot be considered and need not be considered, as affecting acts which are piracy under the law of nations. As the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and piracy under the law of nations is of admiralty and maritime jurisdiction, punishable by every nation, the judicial power of the United States of course extends to it. On this principle the courts of admiralty under the Confederation, took cognizance of piracy, altho' there was no express power in Congress to define and punish the offence.

But the extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction, must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States. There are, cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation. The people of America possessed no other power over the subject, and could consequently transfer no other to their courts, and it has already been proved, that a murder committed on board a foreign ship of war, is not comprehended within this description.

The consular convention with France has also been relied on, as proving, the act of delivering up an individual to a foreign power, to be in its nature judicial and not executive.

The 9th article of that convention authorizes the conſuls and vice conſuls of either nation, to cauſe to be arreſted all deſerters from their veſſels, "for which purpoſe the ſaid conſuls and vice conſuls ſhall addreſs themſelves to the courts, judges and officers competent."

This article of the convention does not, like the 27th article of the treaty with Britain, ſtipulate a national act, to be performed on the demand of a nation; it only authorizes a foreign miniſter to cauſe an act to be done, and preſcribes the courſe he is to purſue. The contract itſelf is, that the act ſhall be performed by the agency of the foreign conſul, through the medium of the courts; but this affords no evidence that a contract of a very different nature, is to be performed in the ſame manner.

It is ſaid that the then Preſident of the United States declared the incompetency of the courts, judges and officers to execute this contract without an act of the legiſlature. But the then Preſident made no ſuch declaration. He has ſaid that ſome legiſlative proviſion is requiſite, to carry the ſtipulations of the convention into *full* effect. This however is by no means declaring the incompetency of a department to perform an act ſtipulated by treaty, until the legiſlative authority ſhall direct its performance.

It has been contended that the conduct of the executive on former occaſions, ſimilar to this in principle, has been ſuch, as to evince an opinion even in that department, that the caſe in queſtion is proper for the deciſion of the courts.

The fact adduced to ſupport this argument is, the determination of the late Preſident, on the caſe of prizes made within the juriſdiction of the United States, or by privateers fitted out in their ports.

The nation was bound to deliver up thoſe prizes in like manner as the nation is now bound to deliver up an individual demanded under the 27th article of the treaty with Britain. The duty was the ſame, and devolved on the ſame department.

In quoting the deciſion of the executive on that caſe, the gentleman from New-York has taken occaſion to beſtow high encomium on the late Preſident, and to conſider his conduct as furniſhing an example worthy the imitation of his ſucceſſor.

It muſt be cauſe of much delight to the real friends of that great man,—to thoſe who ſupported his adminiſtration while in office, from a conviction of its wiſdom and its virtue, to hear the unqualified praiſe which is now beſtowed on it, by thoſe who had been ſuppoſed to poſſeſs different opinions. If the meaſure now under conſideration, ſhall be found, on examination, to be the ſame in principle, with that which has been cited, by its opponents, as a fit precedent for it, then may the friends of the gentleman now in office indulge the hope, that when he, like his predeceſſor, ſhall be no more, his conduct too may be quoted as an example for the government of his ſucceſſors.

The evidence relied on to prove the opinion of the then executive on the caſe, conſiſts of two letters from the Secretary of State, the

one of the 29th of June 1793 to Mr. Genet, and the other of the 16th of Auguſt 1793 to Mr. Morris.

In the letter to Mr. Genet, the Secretary ſays, that the claimant having filed his libel againſt the ſhip William, in the court of Admiralty, there was no power which could take the veſſel out of court, until it had decided againſt its own juriſdiction, that having ſo decided, the complaint is lodged with the executive, and he aſks for evidence to enable that department to conſider and decide finally on the ſubject.

It will be difficult to find in this letter an executive opinion, that the caſe was not a caſe for executive deciſion. The contrary is clearly avowed. It is true that when an individual claiming the property as his, had aſſerted that claim in a court, the executive acknowledges in itſelf a want of power, to diſmiſs or decide upon the claim thus pending in court. But this argues no opinion of a want of power in itſelf to decide upon the caſe, if inſtead of being carried before a court as an individual claim, it is brought before the executive as a national demand. A private ſuit inſtituted by an individual, aſſerting his claim to property, can only be controled by that individual. The executive can give no direction concerning it. But a public proſecution carried on in the name of the United States, can without impropriety be diſmiſſed at the will of the government. The opinion therefore given in this lettter is unqueſtionably correct, but it is certainly miſunderſtood when it is conſidered as being an opi-

nion that the queſtion was not, in its nature, a queſtion for executive deciſion.

In the letter to Mr. Morris the ſecretary aſſerts the principle, that veſſels taken within our juriſdiction ought to be reſtored, but ſays it is yet unſettled whether the act of reſtoration is to be performed by the executive or judicial department.

The principle then according to this letter is not ſubmitted to the courts, whether a veſſel captured within a given diſtance of the American coaſt was or was not captured within the juriſdiction of the United States, was a queſtion not to be determined by the courts, but by the executive. The doubt expreſſed is, not what tribunal ſhall ſettle the principle, but what tribunal ſhall ſettle the fact. In this reſpect a doubt might exiſt in the caſe of prizes, which could not exiſt in the caſe of a man. Individuals on each ſide claimed the property, and therefore their rights could be brought into court, and there conteſted as a caſe in law or equity. The demand of a man made by a nation ſtands on different principles.

Having noticed the particular letters cited by the gentleman from New-York, permit me now ſaid Mr. Marſhall to aſk the attention of the houſe to the whole courſe of executive conduct on this intereſting ſubject.

It is firſt mentioned in a letter from the ſecretary of ſtate to Mr. Genet of the 25th of June 1793. In that letter, the ſecretary ſtates a conſultation between himſelf and the ſecretaries of the treaſury and war, (the Preſident being abſent) in which (ſo well were they aſſured

of the President's way of thinking in those cases) it was determined, that the vessels should be detained in the custody of the consuls in the ports, "until the government of the United States shall be able to *enquire into and decide on the fact.*"

In his letter of the 12th of July 1793 the secretary writes that the President has determined to *refer* the questions concerning prizes "to *persons learned in the laws.*" And he requests that certain vessels enumerated in the letter should not depart "until *his* ultimate determination shall be made known."

In his letter of the 7th of August 1793, the Secretary informs Mr. Genet that the President considers the U. States as bound to "*to effectuate the restoration of*, or to make compensation for, prizes which shall have been made of any of the parties at war with France, subsequent to the 5th day of June last, by privateers fitted out of our ports." That it is consequently expected that Mr. Genet will cause restitution of such prizes to be made. And that the United States "will cause restitution" to be made "of all such prizes as shall be hereafter brought within their ports by any of the said privateers."

In his letter of the 10th of November 1793 the Secretary informs Mr. Genet, that, for the purpose of obtaining testimony to ascertain the fact of capture within the jurisdiction of the United States, the Governors of the several states were requested on receiving any such claim, immediately to notify thereof the Attornies of their several districts; whose duty it would be to give notice "to the principal agent

of both parties and alſo to the conſuls of the nations intereſted, and to recommend to them, to appoint by mutual conſent, arbiters to decide whether the capture was made within the juriſdiction of the United States as ſtated in my letter of the 8th. inſt. according to whoſe award the Governor may proceed to deliver the veſſel to the one or the other party." If either party refuſes to name arbiters then the attorney is to take depoſitions on notice, which "he is to tranſmit for the *information and deciſion of the Preſident.*" "This prompt procedure is the more to be inſiſted on, as it will enable the Preſiden, *by an immediate delivery* of the veſſel and cargo to the party having title, to prevent the injuries conſequent on long delay."

In his letter of the twenty-ſecond of Nov. 1793 the Secretary repeats, in ſubſtance, his letter of the 12th of July and 7th of Auguſt, and ſays that the determination to deliver up certain veſſels, involved the brig Jane of Dublin, the brig Lovley Laſs, and the brig Prince William Henry. He concludes with ſaying, "I have it in charge to enquire of you, ſir, whether theſe three brigs have been given up, according to the *determination of the Preſident*, and if they have not to repeat the requiſition that they be given up to their former owners."

Ultimately it was ſettled that the fact ſhould be inveſtigated in the courts, but the deciſion was regulated by the principles eſtabliſhed by the executive department.

The deciſion then on the caſe of veſſels captured within the American juriſdiction, by privateers fitted out of the American ports, which

the gentleman from New-York has cited with ſuch merited approbation; and which he has declared to ſtand on the ſame principles, with thoſe which ought to have governed, in the case of Thomas Naſh; which deſerves the more reſpect, becauſe the government of the United States was then ſo circumſtanced as to aſſure us, that no opinion was lightly taken up, and no reſolution formed but on mature conſideration. This deciſion quoted as a precedent and pronounced to be right, is found, on fair and full examination, to be preciſely and unequivocally the ſame, with that which was made in the caſe under conſideration. It is a full authority to ſhow, that, in the opinion always held by the American government, a caſe like that of Thomas Naſh, is a caſe for Executive and not judicial deciſion.

The clauſe in the conſtitution which declares that "the trial of all crimes, except in caſes of impeachment, ſhall be by jury," has alſo been relied on as operating on the caſe, and transferring the deciſion on a demand for the delivery of an individual, from the executive to the judicial department.

But certainly this clauſe in the conſtitution of the United States cannot be thought obligatory on, and for the benefit of, the whole world. It is not deſigned to ſecure the rights of the people of Europe and Aſia, or to direct and controul proceedings againſt criminals throughout the univerſe. It, can then, be deſigned only, to guide the proceedings of our own courts, and to preſcribe the mode of puniſhing offences committed againſt the government of

the United States, and to which the juriſdiction of the nation may rightfully extend.

It has already been ſhown that the courts of the United States were incapable of trying the crime for which Thomas Naſh was delivered up to juſtice, the queſtion to be determined was not how his crime ſhould be tried and puniſhed but whether he ſhould be delivered up to a foreign tribunal which was alone capable of trying and puniſhing him. A proviſion for the trial of crimes in the courts of the United States is clearly not a proviſion for the performance of a national compact, for the ſurrender to a foreign government of an offender againſt that government.

The clauſe of the conſtitution declaring that the trial of all crimes ſhall be by jury, has never even been conſtrued to extend to the trial of crimes committed in the land and naval forces of the United States. Had ſuch a conſtruction prevailed, it would moſt probably have proſtrated the conſtitution itſelf, with the liberties and the independence of the nation, before the firſt diſciplined invader who ſhould approach our ſhores. Neceſſity would have imperiouſly demanded the review and amendment of ſo unwiſe a proviſion. If then this clauſe does not extend to offences committed in the fleets and armies of the United States, how can it be conſtrued to extend to offences committed in the fleets and armies of Britain or of France, of the Ottoman or Ruſſian empires?

The ſame argument applies to the obſervations on the 7th article of the amendments to the conſtitution. That article relates only to

trials in the courts of the United States, and not to the performance of a contract for the delivery of a murderer not triable in thoſe courts.

In this part of the argument, the gentleman from New-York has preſented a dilemma of a very wonderful ſtructure indeed. He ſays that the offence of Thomas Naſh was either a crime or not a crime. If itwas a crime, the conſtitutional mode of puniſhment ought to have been obſerved—if it was not a crime, he ought not to have been delivered up to a foreign government, where his puniſhment was inevitable.

It had eſcaped the obſervation of that gentleman, that if the murder committed by Thomas Naſh was a crime, yet it was not a crime provided for by the conſtitution, or triable in the courts of the United States: And that if it was not a crime, yet it is the preciſe caſe in which his ſurrender was ſtipulated by treaty. Of this extraordinary dilemma then, the gentleman from New-York is, himſelf, perfectly at liberty, to retain either form.

He has choſen to conſider it as a crime, and ſays it has been made a crime by treaty, and is puniſhed by ſending the offender out of the country.

The gentleman is incorrect in every part of his ſtatement. Murder on board a Britiſh frigate, is not a crime created by treaty. It would have been a crime of preciſely the ſame magnitude, had the treaty never been formed. It is not puniſhed by ſending the offender out of the United States. The experience of this unfortunate criminal, who was hung and gib-

beted, evinced to him, that the puniſhment of his crime was of a much more ſerious nature, than mere baniſhment from the United States.

The gentleman from Pennſylvania and the gentleman from Virginia have both contended, that this was a caſe proper for the deciſion of the courts, becauſe points of law occurred, and points of law muſt have been decided, in its determination.

The points of law which muſt have been decided, are ſtated by the Gentleman from Pennſylvania to be, firſt, a queſtion whether the offence was committed within the Britiſh juriſdiction; and, ſecondly, whether the crime charged was comprehended within the treaty.

It is true, ſir, theſe points of law muſt have occurred, and muſt have been decided: but it by no means follows that they could only have been decided in court. A variety of legal queſtions muſt preſent themſelves in the performance of every part of executive duty, but theſe queſtions are not therefore to be decided in court. Whether a patent for land ſhall iſſue or not, is always a queſtion of law, but not a queſtion which muſt neceſſarily be carried into court. The gentleman from Pennſylvania ſeems to have permitted himſelf to have been miſled, by the miſrepreſentation of the conſtitution, made in the reſolutions of the gentleman from New York: and, in conſequence of being ſo miſled, his obſervations have the appearance of endeavouring to fit the conſtitution to his arguments, inſtead of adapting his argument to the conſtitution.

When the gentleman has proved that theſe are queſtions of law, and that they muſt have been decided by the Preſident, he has not advanced a ſingle ſtep towards proving, that they were improper for executive deciſion. The queſtion whether veſſels captured within three miles of the American coaſt, or by privateers fitted out in the American ports, were legally captured or not, and whether the American government was bound to reſtore them if in its power, were queſtions of law, but they were queſtions of political law, proper to be decided and they were decided by the executive and not by the c urts.

The caſus fœderis of the guaranty was a queſtion of law, but no man would have hazarded the opinion; that ſuch a queſtion muſt be carried into court, and can only be there decided. So the caſus fœderis under the 27th article of the treaty with Britain is a queſtion of law, but of political law. The queſtion to be decided is whether the particular caſe propoſed be one, in which the nation has bound itſelf to act, and this is a queſtion depending on principles never ſubmitted to courts.

If a murder ſhould be committed within the United States, and the murderer ſhould ſeek an aſylum in Britain, the queſtion whether the caſus fœderis of the 27th article had occurred, ſo that his delivery ought to be demanded, would be a queſtion of law, but no man would ſay it was a queſtion which ought to be decided in the courts.

When therefore the gentleman from Pennſylvania has eſtabliſhed, that in delivering up

Thomas Naſh, points of law were decided by the Preſident, he has eſtabliſhed a poſition, which in no degree whatever, aids his argument.

The caſe was in its nature a national demand made upon the nation. The parties were the two nations, They cannot come into court to litigate their claims, nor can a court decide on them. Of conſequence the demand is not a caſe for judicial cognizance.

The Preſident is the ſole organ of the nation in its external relations, and its ſole repreſentative with foreign nations. Of conſequence the demand of a foreign nation can only be made on him.

He poſſeſſes the whole executive power. He holds and directs the force of the nation. Of conſequence any act to be performed by the force of a nation, is to be performed through him.

He is charged to execute the laws. A treaty is declared to be a law. He muſt then execute a treaty, where he and he alone poſſeſſes the means of executing it.

The treaty which is a law enjoins the performance of a particular object. The perſon who is to perform this object is marked out by the conſtitution, ſince the perſon is named who conducts the foreign intercourſe, and is to take care that the laws be faithfully executed. The means by which it is to be performed—the force of the nation, are in the hands of this perſon. Ought not the perſon to perform the object, altho' the particular mode of uſing the means, has not been preſcribed? Congreſs

unqueſtionably may preſcribe the mode; and Congreſs may devolve on others the whole execution of the contract: but till this be done, it ſeems the duty of the executive department to execute the contract, by any means it poſſeſſes.

The gentleman from Pennſylvania contends that, altho' this ſhould be properly an executive duty, yet it cannot be performed until Congreſs ſhall direct the mode of performance. He ſays that altho' the juriſdiction of the courts is extended by the Conſtitution, to all caſes of admiralty and maritime juriſdiction, yet if the courts had been created without any expreſs aſſignment of juriſdiction, they could not have taken cognizance of cauſes expreſſly allotted to them by the conſtitution. The executive he ſays can, no more than courts,—ſupply a legiſlative omiſſion.

It is not admitted that in the caſe, ſtated courts could not have taken juriſdiction. The contrary is believed to be the correct opinion. And, altho' the executive cannot ſupply a total legiſlative omiſſion, yet it is not admiited or believed that there is ſuch a total omiſſion in this caſe.

The treaty ſtipulating that a murderer ſhall be delivered up to juſtice, is as obligatory as an act of Congreſs making the ſame declaration. If then there was an act of Congreſs in the words of the treaty, declaring that a perſon who had committed murder within the jutiſdiction of Britain, and ſought an aſſylum within the territory of the United States, ſhould be delivered up by the United States, on the de-

mand of his Britannic Majeſty, and ſuch evidence of his criminalty, as would have juſtified his commitment for trial, had the offence been here committed; could the Preſident who is bound to execute the laws have juſtified a refuſal to deliver up the criminal, by ſaying that the legiſlature had totally omitted to provide for the caſe?

The executive is not only the conſtitutional department, but ſeems to be the proper department, to which the power in queſtion may moſt wiſely and moſt ſafely be confided.

The department which is entruſted with the whole foreign intercourſe of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements, with foreign nations, and for the conſequences reſulting from ſuch violation, ſeems the proper department, to be entruſted with the execution of a national contract, like that under conſideration.

If at any time policy may temper the ſtrict execution of the contract, where may that political diſcretion be placed ſo ſafely, as in the department, whoſe duty it is to underſtand preciſely, the ſtate of the political intercourſe and connection between the United States and foreign nations; to underſtand the manner in which the particular ſtipulation is explained and performed by foreign nations; and to underſtand completely the ſtate of the union?

This department too, independent of judicial aid which may, perhaps, in ſome inſtances be called in, is furniſhed with a great law officer,

whoſe duty it is to underſtand and to adviſe, when the caſus fœderis occurs. And if the Preſident ſhould cauſe to be arreſted under the treaty, an individual who was ſo circumſtanced, as not to be properly the object of ſuch an arreſt, he may perhaps bring the queſtion of the legality of his arreſt, before a Judge by a writ of habeas corpus.

It is then demonſtrated, that according to the practice, and according to the principles of the American government, the queſtion whether the nation has or has not bound itſelf to deliver up any individual, charged with having committed murder or forgery within the juriſdiction of Britain, is a queſtion the power to decide which, reſts alone with the executive department.

It remains to enquire, whether in exerciſing this power, and in performing the duty it enjoins, the Preſident has committed an unauthorized and dangerous interference with judicial deciſions.

That Thomas Naſh was committed originally, at the inſtance of the Britiſh conſul at Charleſton, not for trial in the American courts, but for the purpoſe of being delivered up to juſtice in conformity with the treaty, between the two nations, has been already ſo ably argued by the gentleman from Delaware, that nothing further can be added to that point. He would therefore, Mr. Marſhall ſaid, conſider the caſe as if Naſh, inſtead of having been committed for the purpoſes of the treaty, had been committed for trial. Admitting even this to have been the fact, the concluſions which have been drawn from it were by no means warranted.

Gentleman had conſidered it as an offence againſt judicial authority, and a violation of judicial rights, to withdraw from their ſentence a criminal againſt whom a proſecution had been commenced. They had treated the ſubject, as if it was the privilege of courts, to condemn to death, the guilty wretch arraigned at their bar, and that to intercept the judgement was to violate the privilege. Nothing can be more incorrect than this view of the caſe. It is not the privilege, it is the ſad duty of courts to adminiſter criminal juſtice. It is a duty to be performed at the demand of the nation, and with which the nation has a right to diſpenſe. If judgment of death is to be pronounced, it muſt be at the proſecution of the nation, and the nation may at will ſtop that proſecution. In this reſpect the Preſident expreſſes conſtitutionally the will of the nation, and may rightfully as was done in the caſe at Trenton, enter a nolle proſequi, or direct that the criminal be proſecuted no further. This is no interference with judicial deciſions; nor any invaſion of the province of a court. It is the exerciſe of an indubitable and a conſtitutional power. Had the Preſident directed the judge at Charleſton to decide for or againſt his own juriſdiction—to condemn or acquit the priſoner—this would have been a dangerous interference with judicial deciſions and ought to have been reſiſted.

But no ſuch direction has been given, nor any ſuch deciſion been required. If the Preſident determined that Thomas Naſh ought to have been delivered up to the Britiſh government, for a murder committed on board a Britiſh fri-

gate, provided evidence of the fact was adduced; it was a queſtion which duty obliged him to determine, and which he determined rightly. If in conſequence of this determination he arreſted the proceedings of a court on a national proſecution, he had a right to arreſt and to ſtop them, and the exerciſe of this right was a neceſſary conſequence of the determination of the principal queſtion. In conforming to this deciſion, the court has left open the queſtion of its juriſdiction. Should another proſecution of the ſame ſort be commenced, which ſhould not be ſuſpended but continued by the executive, the caſe of Thomas Naſh would not bind as a precedent againſt the juriſdiction of the court. If it ſhould even prove that, in the opinion of the executive, a murder committed on board a foreign fleet was not within the juriſdiction of the court, it would prove nothing more: and though this opinion might rightfully induce the executive to exerciſe its power over the proſecution, yet if the proſecution was continued, it could have no influence with the court in deciding on its juriſdiction.

Taking the fact then even to be, as the gentlemen in ſupport of the reſolutions would ſtate it, the fact cannot avail them.

It is to be remembered too, that in the caſe ſtated to the Preſident, the judge himſelf appears to have conſidered it as proper for executive deciſion, and to have wiſhed that deciſion. The Preſident and judge ſeem to have entertained, on this ſubject, the ſame opinion: and in conſequence of the opinion of the judge, the application was made to the Preſident.

It has then been demonſtrated.

1ſt. That the caſe of Thomas Naſh, as ſtated to the Preſident, was compleatly within the 27th article of the treaty between the United States of America and Great Britain.

2ly That this queſtion was proper for executive and not for judicial deciſion, and

3dly That, in deciding it, the Preſident is uot chargeable with an interference with judicial deciſions.

After treſpaſſing ſo long Mr. Marſhall ſaid on the patience of the houſe, in arguing what had appeared to him to be the material points growing out of the reſolutions. he regretted the neceſſity of detaining them ſtill longer, for the purpoſe of noticing an obſervation, which appeared not to be conſidered, by the gentleman who made it, as belonging to the argument.

The ſubject introduced by this obſervation however was ſo calculated to intereſt the public feelings, that he muſt be excuſed for ſtating his opinion on it.

The gentleman from Pennſylvania had ſaid, that an impreſſed American ſeaman, whoſhould commit homicide for the purpoſe of liberating himſelf from the veſſel in which he was confined, ought not to be given up as a murderer. In this, Mr Marſhall ſaid, he concurred entirely with that gentleman. He believed the opinion to be unqueſtionably correct,—as were the reaſons that gentleman had given in ſupport of it. He had never heard any American avow a contrary ſentiment, nor did he believe a contrary ſentiment could find a place in the boſom of any American. He could not pre-

fend, and did not pretend, to know the opinions of the executive on the ſubject, becauſe he had never heard the opinions of that department, but he felt the moſt perfect conviction, founded on the general conduct of the government, that it could never ſurrender an impreſſed American to the nation, which, in making the impreſſment, had committed a national injury.

This belief was in no degree ſhaken, by the conduct of the executive in this particular caſe.

In his own mind it was a ſufficient defence of the Preſident, from an imputation of this kind, that the fact of Thomas Naſh being an impreſſed American, was obviouſly not contemplated by him in the deciſion he made on the principles of the caſe. Conſequently if a new circumſtance occured, which would eſſentially change the caſe decided by the Preſident, the judge ought not to have acted under that deciſion, but the new circumſtance ought to have been ſtated. Satisfactory as this defence might appear, he ſhould not reſort to it, becauſe to ſome it might ſeem a ſubterfuge. He defended the conduct of the Preſident on other, and ſtill ſtronger ground.

The Preſident had decided that a *murder* committed on board a Britiſh frigate on the high ſeas, was within the juriſdiction of that nation, and conſequently within the 27th. article of its treaty with the United Stttes. He therefore directed Thomas Naſh to be delivered to the Britiſh miniſter, if ſatisfactory evidence of the *murder* ſhould be adduced. The ſufficiency of the evidence was ſubmitted entirely to the judge. If Thomas Naſh had committed a murder, the

deciſion was that he ſhould be ſurrendered to the Britiſh miniſter, if he had not committed a murder, he was not to be ſurrendered.

Had Thomas Naſh been an impreſſed American, the homicide on board the Hermoine, would, moſt certainly, not have been murder.

The act of impreſſing an American is an act of lawleſs violence. The confinement on board a veſſel is a continuation of that violence, and an additional outrage. Death committed within the United States, in reſiſting ſuch violence, would not have been murder, and the perſon giving the wound, could not have been treated as a murderer. Thomas Naſh was only to have been delivered up to juſtice on ſuch evidence as, had the fact been committed within the United States, would have been ſufficient to have induced his commitment and trial for murder. Of conſequence the deciſion of the Preſident was ſo expreſſed, as to exclude the caſe of an impreſſed American liberating himſelf by homicide.

He concluded with obſerving that he had already too long availed himſelf of the indulgence of the Houſe, to venture further on that indulgence, by recapitulating, or reinforcing the arguments which had already been urged.

FINIS.

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